FILE COPY

DEC 30 19
CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 104

BANKERS POCAHONTAS COAL COMPANY,
PETITIONER,

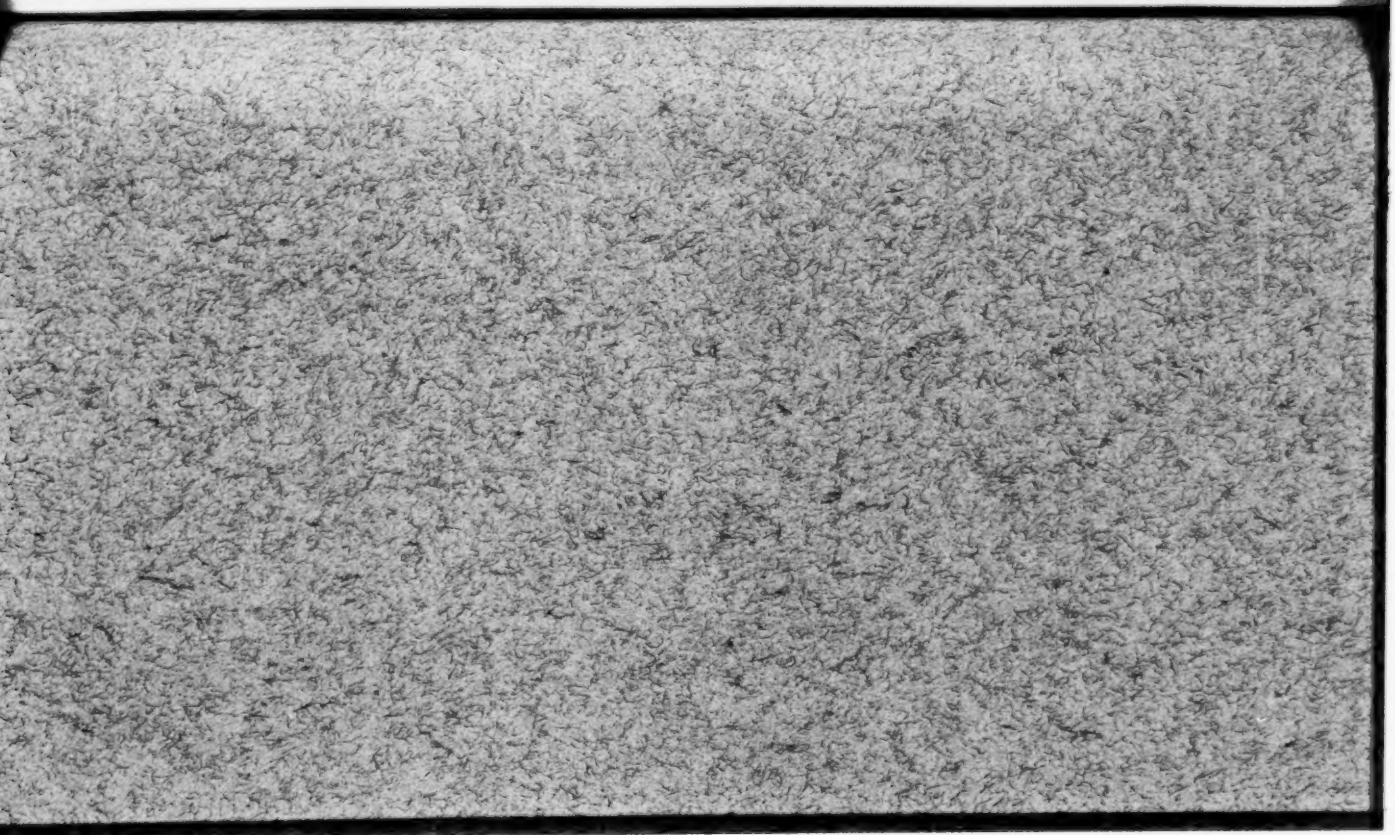
v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR REHEARING.
(Opinion December 5, 1932.)

CAMDEN R. McATEE,
Attorney for Petitioner.

MASON, SPALDING &
McATEE,
Of Counsel.



INDEX.

SUBJECT INDEX.

Page

Reconsideration and modification of *first* and *third* points decided, for cause:

a. Not responsive 1

b. Misapprehend the subject matter 1

c. Premises of fact are not those of the case 2

Additional facts pertinent:

No contract provision for minimum or maximum annual production 2

Receipts of royalties as bonus exceeded payment for coal mined 2

The error of the first point 3

Petitioner's propositions are:

a. The contract receipts contain no income increment 5

b. Depletion is not applicable where depletable interest, if any, ceased before the amendment 5

No calculable return from the contracts 6

Commissioner's depletion allowance is merely present value of royalty per ton, and conflicts with Reinecke v. Spalding, 280 U. S. 227, 233 6

Under facts, present value not existent, Burnet v. Logan, 283 U. S. 404, 413; Lucas v. Alexander, 279 U. S. 573, 579 7

Petitioner's rights vested before amendment may not be taken away by subsequent Revenue Acts .. 9

Amendment and Revenue Acts apply to subsequent transactions, according to Burnet v. Harmel, No. 26, November 7, 1932, which does not govern here. 9

The error of the third point:

Any depletion allowance should apply to the excess payments (Burnet v. Harmel and Murphy Oil Co. v. Burnet), but is here denied apparently because the necessary facts were not of record. The record shows the facts were in evidence and found by the Board. The Board reconsidered the case upon the issue of depletion upon *coal paid for* 13, 14

Page

Petitioner never asked review of the exclusion of the leases from evidence. It asked review of the refusal of depletion upon coal paid for respondent, in the Murphy Oil case, was asking the same thing, and here briefed and abandoned issue to avoid confession of error. The record substantiates the propriety of depletion allowances upon coal paid for..... 15

Conclusion 16

Decisions and authorities cited:

Burnet v. Harmel, No. 26, October Term, 1932, November 7, 1932..... 9, 13

Burnet v. Logan, 283 U. S. 404, 413..... 7

Lucas v. Alexander, 279 U. S. 573, 579..... 7

Murphy Oil Co. v. Burnet, No. 80, October Term, 1932, December 5, 1932..... 11, 13, 15

Reinecke v. Spalding, 280 U. S. 227, 233..... 6

Article 90, Regulations 45, 62, 65, 69..... 8

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 104

BANKERS POCAHONTAS COAL COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR REHEARING.

Petitioner, after much reflection of counsel, respectfully requests a reconsideration and modification of the opinion herein (December 5, 1932, by Mr. Justice Stone) upon the first and third points decided, requiring their reversal in substance, for cause:

a. The decision is not responsive to the issues presented.

b. The decision seemingly misapprehends the subject matter in issue.

c. The decision is proper upon the premises of fact therein adopted—but said premises unfortunately do not reflect the case at bar.

The facts recited in the opinion[1] would be complete if they included the following additional but material details. First, *that the contracts called for no definite annual production of tonnage, either maximum or minimum*[1a], and second, *petitioner in the several years received royalties considerably in excess of the coal actually mined*[1b].

Out of these incidental but material details arises the case of petitioner, and without them its case upon

---

[1]The opinion states:

> "Petitioner, in 1912, acquired West Virginia coal lands in fee and, by assignment from the prior owners, certain leases or contracts entered into by them with various coal operators, by which the latter acquired the right to enter upon and use the lands for the production of coal and coke for a specified period, in consideration of stipulated royalties for the coal and coke produced, including minimum royalty payments in each year. In determining petitioner's income and profits taxes for the years 1920 to 1926, the Commissioner of Internal Revenue treated the royalty payments, after deducting a depletion allowance of 3.6¢ per ton of coal mined, as taxable income of petitioner, and assessed a corresponding increase in the tax."

[1a]R. p. 41.

[1b]See schedule, R. p. 160.

the first and third points decided is barren of the issues briefed and argued for petitioner in its presentation.

Assuming the presence of the two details of fact mentioned above, we briefly present our ground of objection to the decision.

The Error of the First Point as Decided.[2]

Petitioner does insist no part of the royalties is taxable income, but not because of any sale of coal in place or immediate passage of title. It does not argue the

---

[2] "*First.* It is insisted that no part of the royalties is taxable income of petitioner. Petitioner rests this contention on what is stated to be a rule of law of West Virginia, that under coal leases, like those presently involved, the title to the coal, in place, passes to the lessee or operator immediately on execution of the lease. From this it is argued that the royalties received were but payments for capital assets acquired and sold by petitioner before the adoption of the Sixteenth Amendment, and that their taxation as income is not authorized either by the statute or by the Sixteenth Amendment, because not apportioned.

"The question whether payments of bonus and royalties from the lessee to the lessor of an oil lease are income within the meaning of the revenue laws taxing income, or a return of capital as upon a sale of the oil, was recently before this Court in No. 26, *Burnet* v. *Harmel*, decided November 7, 1932. Although it was contended there, as it is here, that by state law the

royalties are but payments for capital assets acquired and sold by petitioner before adoption of the Amendment, because petitioner never sold the coal. It only acquired the land in 1912 after the coal was contracted

---

title to the mineral content of the leased land passed to the lessee upon execution of the lease, it was held that this characterization of the transaction in the local law did not affect the conclusion that the payments were gross income subject to tax, after the deductions allowed by the taxing act. The considerations which led to the conclusion that bonus and royalties paid to the lessor of Texas oil lands are taxable income and not a conversion of capital, as upon a sale of capital assets, are equally applicable to West Virginia coal leases, whether the title to the coal passes to the lessee in place at the date of the lease, or only upon severance by the lessee.

"The applicable statutes thus construed and applied do not tax any part of petitioner's capital investment before March 1, 1913. Section 234(*a*)(9) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, and regulations under it, require depletion allowances upon bonus and royalty payments received by the lessor of mineral lands, sufficient to provide for a return in full of his invested capital. The provisions of that section, and the related Treasury Regulations have been continued with the later Revenue Acts, see No. 80, *Murphy Oil Co.* v. *Burnet,* decided this day. The fact that the depletion allowance under the Revenue Act of 1913 was more limited is not pertinent here. *Burnet* v. *Thompson Oil & Gas Co.,* 283 U. S. 301."

in 1902, and also, in 1912, acquired the right to collect the subsequent contract payments. Sale of capital assets in place, or otherwise, or immediate passage of title, or their acquisition and sale either before or after the Amendment, these have nothing to do with the primary position of petitioner, that the receipts are the mere proceeds of a claim existing before the Amendment, and contain no income increment. They may and do touch the alternative issue of the pertinency of depletion allowances to the case. Petitioner insists the royalties are not depletable because the sale of coal in place with its immediate passage of title was effected before the enactment of the XVI Amendment, and petitioner never had a depletable interest.

Petitioner, under the typical contract, is entitled to 10 cents per ton of coal mined each year, and including a minimum payment of $5,000, and was entitled to that on March 1, 1913. How much will petitioner get thereafter in the unexpired 20 years of the 30 year term? It will be $100,000 theoretically of minimum, but the actual receipts beyond that depend on what the operator elects to produce. In fact, under the typical Cletus lease[3], receipts from 1908 to 1914, inclusive, were much less than $5,000 a year, and approximated the minimum in 1915-1917, and in 1918 and 1919 were double the contract minimum[3a]. In the later years they were $12,000 instead of $5,000, but much less coal was mined[3b]. No present value on the critical date

---

[3]R. pp. 40, 41.
[3a]R. p. 105.
[3b]R. p. 45.

can be assigned to such a contract. Lift it out of mining—if A says to B—"here's a dollar for the privilege of parking my car on your lot this month, and I will pay 25 cents every day I park there"—no one can calculate what B may make, or what the contract is worth to him—and the illustration is identical with the present case.

Will the present value of 3.6 cents per ton obtained by the Commissioner stand up under analysis? It is in effect $\frac{(14{,}000{,}000 \text{ ton x } 10 \text{ cents})}{14{,}000{,}000}$ *to present value*, which is the same as the present value of 10 cents at the beginning of 40 years. The Commissioner obtains this result indirectly under his regulations for computing depletion. He estimates 14,000,000 tons of content mineable at 350,000 tons per year, giving a 40 year life. He estimates 34,000 a year receipts for each of 40 years, or a total of $1,360,000, which at present value is $510,000. That divided by 14,000,000 tons is 3.6 cents per ton[4].

The mere present value of an ultimate receipt per ton is not the proper deduction according to *Reinecke* v. *Spalding*[5]. As here computed over a 40-year life of a contract, having but 20 years to run, it is in apparent

---

[4]R. p. 93.

[5]280 U. S. 227, 233—

> "—it disregards the fact that respondent's interest was in the mines considered as entireties and not in particular parts of ore beds which the lessee had agreed to remove during designated future years."

error, for it takes a larger present value at the beginning of 20 years than at the beginning of 40 years to realize 10 cents at the end of the periods. This Court has said a present value on the critical date is not computable in case of a mineral lease providing no minimum or maximum annual production nor payment in *Burnet* v. *Logan*[6]. It has further plumbed the situation in *Lucas* v. *Alexander*[7]. It is fully recognized the pro-

---

[6]283 U. S. 404, 413—

> "The lease contract did not require production of either maximum or minimum tonnage, or any definite payments. * * *
>
> "* * * a promise to pay indeterminate sums of money is not necessarily taxable income. 'Generally speaking the income tax law is concerned only with realized losses, as with realized gains.' "
>
> "The consideration for the sale was * * * the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value."

[7]279 U. S. 573, 579 (Mr. Justice Stone, writing):

> "The purpose of ascertaining the value of the taxpayer's property on March 1, 1913, is as Par. 202 states, to measure that part of the total gain which has arisen or accrued after the enactment of any of the statutes taxing income and thus to arrive at his gain which may be taxed as income. Value of that date may be disregarded unless it serves that purpose. * * *—where

ceeds of a claim owned and existing on the critical date do not constitute income when subsequently collected[8].

> the property has no market value, the statute must be interpreted in the light of its purpose to ascertain taxable gains accruing since March 1, 1913. Hence, in such a case, its fair value on the critical date * * * must be taken * * * to be that part of the amount actually realized by the taxpayer, which, by the use of appropriate accounting methods, can fairly be said to have accrued before March 1, 1913—its value than as compared with the value in fact later realized by the taxpayer taken as a standard. * * * It is never necessary to speculate * * * as to what might later be realized from his property by the taxpayer, nor as to what might have been realized from his property by the taxpayer, nor as to what might have been realized if, on March 1, 1913, he had made some forced disposition of the property which would have precluded any taxable gain. For the necessity of ascertaining value as of March 1, 1913, can never arise until some later date when income has been produced by converting the property into money or money's worth and the amount actually realized is known, and then, as we have said, only for the purpose of apportioning the total gain which had accrued between the periods before and after March 1, 1913."

There is no accounting method which can appropriately be applied to the present case—for no annual return and no fixed term of years in which it will be certainly received can be evolved from the contract.

[8]Article 90, Regulations 45, 62, 65, 69. See Appendix to Petitioner's Brief, p. 51.

Here the contracts at issue were perfected and the resulting rights were vested prior to the XVI Amendment. Neither the XVI Amendment nor subsequent Revenue Acts are retroactive, and cannot decree that a sale of mineral in place was not effected in 1902. That they may do so and treat the parties as lessor and lessee entitled to depletion deductions in taxable transactions subsequent to the Amendment is the effect of *Burnet* v. *Harmel*[9]. Perhaps, the Court said this case was like the *Harmel* case in application of depletion deductions because the opinion herein says "the royalties received were but payments for capital assets acquired and sold by petitioner before the adoption of the XVI Amendment". In fact, the capital assets, if that mean the coal content, admittedly were never acquired or sold by petitioner, having been sold in place by its predecessor in 1902. As petitioner never had any interest in the coal content before the Amendment or thereafter, it would follow the statutory depletion allowances cannot be impressed upon petitioner concerning a coal content which it never owned, and in derogation of rights created and existing before the Amendment was enacted.

For these material reasons the principles of the *Harmel* case do not appear to govern this case, but are fully applicable to similar cases arising subsequent to the Amendment.

Summarizing, petitioner submits the opinion should decide whether the royalty receipts, collected by petitioner subsequent to the Amendment under the con-

---

[9]No. 26, Oct. Term, 1932, Nov. 7, 1932.

tracts previously effecting a sale of coal in place, are the non-taxable receipts of their claim therefor as existing on and before the critical date, and having no ascertainable capital value at that date. Alternatively, it should decide, in case of a sale of coal in place consummated before the Amendment, that the proceeds thereafter collected are not depletable under the subsequent Revenue Acts. However, this second statement is unnecessary if the first statement is deemed established.

The Error of the Third Point as Decided.[10]

If, under the first point, it appear there is no taxable income in the royalty receipts, the third point

---

[10] "*Third.* After the Board of Tax Appeals had filed its findings of fact and opinion, both respondent and petitioner submitted recomputations of the amount of the deficiency under the Board's report, as provided by Rule 50 of the Board's Rules of Practice. In petitioner's recomputation, the claim was made for the first time that the minimum royalty payments stipulated by the leases had in some instances exceeded the amount of the per ton royalty which would have been payable on actual production, and it was asked that the depletion allowance be computed upon the basis of the actual payments made, instead of upon the number of tons extracted. Petitioner, at a hearing on the recomputation, tendered evidence in support of this claim. The Board rejected the evidence and denied petitioner's motion for a rehearing

becomes of no importance, since it refers to the basis of depletion allowances.

The third point places petitioner outside the pale of *Burnet* v. *Harmel* and *Murphy Oil Co.* v. *Burnet*[11], with respect to allowance of depletion upon coal paid for but not mined. The facts in the opinion are substantially based upon those stated in the brief of defendant and vary from the record. This requires a brief explanation of the record.

---

[11]No. 80, Oct. Term, 1932, Dec. 5, 1932.

---

in order to present this contention. The Court below upheld this action.

"The Board is authorized to prescribe rules of practice and procedure for the conduct of proceedings before it. Par. 601, Revenue Act of 1928, c. 852, 45 Stat. 791, 871, 872, amending Par. 907(*a*), Revenue Act of 1924, as amended; see *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. Rule 50 prescribes the procedure for computing the amount of the deficiency after the Board has heard and decided the issues raised and presented on the merits. In terms, it directs that the hearing on the computation which it authorizes is to be 'confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no argument will be heard upon or consideration given to * * * any new issues'. The Board has held that under the Rule new issues may not be raised and urged on a hearing upon the computation. *Great Northern Ry. Co.* v. *Commissioner*, 10 B. T. A. 1347, affirmed on other issues

In trying the Board case, the parties proceeded upon the theory that 3.6 cents per ton had been allowed as depletion without stating whether the allowance was upon *coal paid for* or upon *coal mined*. In fact, the Commissioner was allowing depletion upon *coal paid for* in the deficiency letters[12]. The Board findings ex-

[12]R. pp. 31, 33, 35. The 1924, 1925 and 1926 depletion deduction as to the Superior P. C. Co. lease is upon 120,000 tons, although less than one-half was mined within the year. The same is true of the Oregon and Exeter leases, and others. Compare deficiency letters, *supra*, with Leases 2 and 4, R. pp. 44, 45, 160.

40 F. (2d) 372. The rule was a proper exercise of the power of the Board to prescribe the practice in proceedings before it. See *O'Meara* v. *Commissioner*, 34 F. (2d) 390, 395; *Boggs & Buhl* v. *Commissioner*, 34 F. (2d) 859, 861; *Metropolitan Business College* v. *Blair*, 24 F. (2d) 176, 178; compare *Sooy* v. *Commissioner*, 40 F. (2d) 634.

"The purpose of the tendered evidence was to bring the case within the ruling of the Court of Appeals for the Ninth Circuit affirmed in No. 80, *Murphy Oil Company* v. *Burnet*, *supra*, that bonus payments to the lessor of a mineral lease are to be treated as advanced payments of royalties and depletion allowed. This was a new issue. * * * It is not shown that the evidence tendered was not available to the petitioner in ample time to present it before the Board had made and filed its findings of fact and opinion. Under the circumstances, we cannot say that the Board abused its discretion in denying a rehearing."

hibited the quantities of coal paid for and coal mined each year and the amounts received as stipulated into evidence by the parties. The Board decided depletion was allowable only upon coal mined, following its previous decisions which declared any allowance of depletion upon coal paid for but not mined was improper, and which voided the regulation of respondent authorizing such allowance[13]. This position of the Board is now reversed in *Burnet* v. *Harmel* and *Murphy Oil Co.* v. *Burnet* (*supra*).

Thus, the Board decision created a new issue, not previously in controversy between the parties, and to be met in presentation of the respective Rule 50 tax computations. Respondent's computation, figured according to the Board opinion upon *coal mined*, was presented with verbal reservations[14]. Petitioner, in putting its computation forward upon *coal paid for*, urged a reopening of the case to effect an allowance upon *coal paid* for, pointing out that the schedules, already stipulated in evidence and incorporated in the findings of fact, showed the *coal paid for* substantially exceeded *coal mined* in the several years under some of

---

[13]R. p. 70.

[14]R. p. 108. Counsel for respondent stated * * * that this method was in accordance with the opinion of the Board in this case, and consistent with the Board's rulings in other cases, although the respondent in other cases was committed to the principle of allowing depletion on tonnage of coal paid for instead of upon tonnage of coal actually mined in a taxable year.

the leases[15], and offering the leases in further corroboration of the schedules.

Respondent urged receipt of the leases in evidence upon the propriety of a reopening, and only objected to their admission on the settlement issue, which objection was sustained[16].

The Board took the motion for reopening under advisement and subsequently overruled same[17].

The record thus discloses petitioner offered the leases as supplementing and confirming existing evidential facts stipulated by the parties and adopted by the Board, showing the actual receipt of payments for coal were excess of payments for coal mined in the several years, and that the Board reconsidered the case and subsequently denied a rehearing upon the issue whether depletion should be based upon *coal paid for* instead of merely upon *coal mined* within the year. It also discloses the issue of allowance upon *coal mined* instead of *coal paid for* first arose after the decision of the Board, but that evidence pertinent thereto was already of record.

Petitioner has never asked this Court to review the rejection of the leases. *The point is not assigned as*

---

[15]R. p. 109—

—"and offered to introduce said leases to substantiate the schedules, and to show said payment was the minimum royalty required to be paid under said leases."

[16]R. p. 110.

[17]R. pp. 69-70.

error and was not an issue before this Court. Petitioner did ask this Court to rule that its depletion was computable upon *coal paid for,* relying upon the schedules incorporated in the Board findings to show royalty receipts in excess payments for coal mined[18], were bonus payments subject to depletion. Respondent could not brief the question raised by petitioner without contradicting his position in the *Murphy Oil*[19] case, or admitting that bonus royalties are depletable, and hence, briefed the abandoned issue of admitting the leases in evidence.

Petitioner asks this Court to note that the present record showed by stipulation that the payments each year were much in excess of payments for coal actually mined within the year, and that the additional leases would only be corroborative and explanatory of an existing situation whereby the receipt of bonus payments was shown of record. The Court is asked now to conclude that petitioner is entitled to depletion upon

---

[18]Petitioner's Brief, p. 34—

> "The schedules in the Board findings as to Leases 2 and 4 show in the several years here in controversy, petitioner is deprived of $72,000 of depletition upon an excess of 2,000,000 tons paid for but not mined, and is required to taxpay said amount."

[19]While disallowing depletion upon bonus payments under this decision, the Commissioner by cross appeal in *Murphy Oil Co.* v. *Commissioner,* 55 F. (2) 17, sought and obtained a reversal of the same ruling therein.

the *coal paid for* each year and not merely upon *coal mined,* which is the present decision. The point represents $13,000 of taxes, exclusive of interest on same.

This motion for reconsideration seeks the following results:

1. That petitioner received no taxable income in the several years.
2. Alternatively, if it received taxable income including a capital return to be recaptured through the depletion allowances to a lessor, that said depletion allowance applies to *coal paid for* in the taxable years and not merely to coal mined within said years.
3. To avoid substantial injustice to petitioner by obtaining a proper correction of the opinion herein.

Respectfully submitted,

CAMDEN R. McATEE,
Counsel for Petitioner.

Certificate of Counsel.

The undersigned counsel for petitioner herein certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

Respectfully,

CAMDEN R. McATEE,
Counsel for Petitioner.